SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 244

LIONEL G. OTT, COMMISSIONER OF PUBLIC FINANCE AND EX-OFFICIO CITY TREASURER OF THE CITY OF NEW ORLEANS, ET AL.,

Appellants,

vs.

MISSISSIPPI VALLEY BARGE LINE COMPANY, AMERICAN BARGE LINE COMPANY AND UNION BARGE LINE CORPORATION

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

ARTHUR A. MORENO,
Counsel for Appellees.

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Appellees believing that the matters hereinafter set forth demonstrate the lack of substance in the questions raised by this appeal, file this statement in opposition to appellants' statement as to jurisdiction. Appellees include herein their

motion to dismiss the appeal, or, in the alternative, to affirm the judgment of the Circuit Court of Appeal for the Fifth Circuit on the ground that the questions raised on behalf of appellants are so insubstantial as not to need further argument.

Jurisdiction is claimed herein under Section 240 of the Judicial Code, as amended (28 U. S. C. A. Section 347), which reads in part as follows:

> "(b) Any case in a circuit court of appeals where is drawn in question the validity of a Statute of any State, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, *and the decision is against its validity*, may, at the election of the party relying on such State statute, be taken to the Supreme Court for review on writ of error or appeal; but in that event a review on certiorari shall not be allowed at the instance of such party, and the review on such writ of error or appeal shall be restricted to an examination and decision of the Federal questions presented in the case. (Italics supplied.)
>
> (c) No judgment or decree of a circuit court of appeals or of the Court of Appeals of the District of Columbia shall be subject to review by the Supreme Court otherwise than as provided in this section."

It is to be noted that the above-quoted statute sets forth two requirements for an appeal. First, the decision of the Circuit Court of Appeals must have concerned the validity of a State statute on the ground of its being repugnant to the Constitution, treaties or laws of the United States. Second, the decision of the Circuit Court of Appeals must have been against the validity of the State statute. It is well settled that a decision of a Circuit Court of Appeals merely *applying* a State law is not reviewable by appeal to the Supreme Court. *Baxter* v. *Continental*

Casualty Company, 284 U. S. 578 (1931); *Westling* v. *United States*, 288 U. S. 590 (1933). In the Statement as to Jurisdiction filed herein by appellants there is the following remark:

> "The Statute of the Legislature of the State of Louisiana, whose provisions, in effect, have been held to violate the due process of law clause of the Constitution of the United States, is Act 59 of 1944 . . . ."

We submit to Your Honors that even the appellants recognize the fact that these appeals do not come within the terms of the above-quoted section of the Judicial Code. The appellants have heretofore applied to this Court for a writ of certiorari which was, in due course, denied. As a last straw, they are now attempting to foist jurisdiction upon this Court even though they recognize, as indicated by the above-quoted portion of their Statement as to Jurisdiction, that the decision of the Circuit Court of Appeals in this matter did not deny the validity of Act 59 of the Louisiana Legislature for the year 1944.

The decision of the United States Circuit Court of Appeals for the Fifth Circuit, which is reported in 166 F. (2d) 509, did not turn upon a question of law, but turned upon a question of fact. The fact decided by the court was that the floating equipment of the three appellees did not have a taxing situs in the State of Louisiana, and, consequently, the State of Louisiana and its agencies were without power to tax. The court clearly stated the issue in the following words:

> "The question common to the various appeals is whether tugboats and barges owned by the different appellees, all non-resident corporations, are taxable in Louisiana as property having a tax situs there."

The court further found that the water equipment of the three appellees came into Louisiana in connection with in-

terstate commerce and remained there only long enough to accomplish the purposes of such commerce. The court further said, with reference to the three appellees, as distinct from the DeBardeleben Coal Corporation, the following:

> "The other three operate up and down the Mississippi and its tributaries to points as far north as Minneapolis and east to Pittsburgh. In all trips to Louisiana a tug brings a line of barges to New Orleans, where the barges are left for unloading and reloading and where the tug picks up a loaded line of barges for ports outside Louisiana. Those turnarounds are accomplished as quickly as possible and there is no regular schedule in the sense of a timetable held to. The result is that the tugs and barges are within the boundary of Louisiana only a small portion of the time. Of the total time covered by the interstate commerce operations in 1943, American's towboats spend about 3.8% within the port of New Orleans. In the case of Mississippi for that year, its towboats spend about 17.25%, and its barges about 12.7%; in 1944, its towboats about 10.2%, and its barges about 17.5%. In 1944, Union's towboats spent about 2.2% and its barges about 4.3%."

The Court of Appeals further said:

> "The court below found from these facts that the tugboats and barges of American, Mississippi, and Union were never permanently within the State of Louisiana during the tax years, hence had no tax situs in Louisiana and could not be taxed by that State or by the City of New Orleans."

The court then reviewed a number of cases and said:

> "Applying these legal principles to the facts of this case, we are of the opinion that the court below was correct in holding that the tugboats and barges of Mississippi, American and Union acquire no tax situs in

> Louisiana, and that no tax could be legally assessed and collected by that State or by the City of New Orleans".

That the court based its decision on a question of fact must be clear from the recitation of what the Court of Appeals said. The conviction that the case turned upon a question of fact, and not upon a denial of principles of law, asserted by the petitioners here, is re-enforced by the fact that the court found that the property of the DeBardeleben Coal Corporation did have a taxing situs in the City of New Orleans. It did not deny to the appellants the application of the principles for which they contended, but, on the contrary, upheld the assessment made by the Louisiana Tax Commission on a proportionate basis, which assessed to the DeBardeleben Coal Corporation 25% of the value of all its watercraft. However, the United States District Court found, and the United States Circuit Court of Appeals affirmed the finding that, in the assessment, had been included barges in Alabama which had never been within the taxing jurisdiction of the State of Louisiana. If the court had denied to the appellants the application of the principles for which they contended, it would have decided against the appellants in favor of the DeBardeleben Coal Corporation, but, instead of so deciding, it remanded the DeBardeleben Coal Corporation case to the United States District Court to correct the assessment by the excision of the value of the barges in Alabama. It must, therefore, be clear that these cases turned upon questions of fact. In the case of the appellees here, the facts of no taxing situs were found in favor of the appellees. In the DeBardeleben Coal Corporation case, the court found in favor of the appellants and held, as a matter of fact, that the property of the DeBardeleben Coal Corporation did have a taxing situs in Louisiana. It impliedly sustained the

method of assessment as to the equipment with taxing situs in Louisiana, but remanded the case only to eliminate barges in Alabama and never in Louisiana.

Because the question has been clearly and unqualifiedly decided against the appellants here, the appeals offer no substantial question for decision by this Court.

WHEREFORE, appellees respectfully submit this statement to show that the questions upon which the decision of this case depends are so insubstantial as not to need further argument, and appellees respectfully move the court to dismiss this appeal, or, in the alternative, to affirm the decree entered below.

July 26, 1948.

(S.) ARTHUR A. MORENO,
Attorney for Mississippi Valley Barge Line Company, American Barge Line Company and Union Barge Line Corporation, Appellees.